Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CIBAO MEAT PRODUCTS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the National Labor Relations Board ("NLRB" or "Board") punish employers for believing that employees intended to engage in concerted activity without identifying the specific concerted activity in question, without determining whether the concerted activity is protected by the Act and, without determining whether an employee's discharge was motivated by his unidentified protected, concerted activity?

2. Can a lone employee's protest of working conditions in a non-unionized workplace during an employee meeting be deemed "concerted activity" where the issue involved in the protest is only presumed to be of interest to other employees, there is no evidence that the employee acted expressly on behalf of one or more employees, and there is no evidence that the employee took action with the proven object of inducing, initiating, or preparing for group action?

3. Is the Board's decision supported by substantial evidence where it fabricated facts to reach a preferred result?

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Petitioner, Cibao Meat Products, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision and order of the Board adopting, with minor exceptions, the ALJ's rulings, findings and conclusions, along with the ALJ's findings of fact, conclusions of law and recommended order is published at 338 NLRB No. 134 (Appendix "App."[1] infra 4a - 35a). The summary order rendered by the court of appeals enforcing the Board's order and denying petitioner's petition for review (App. 1a - 3a) is unpublished. The United States court of appeals for the Second Circuit's denial of Cibao's petition for rehearing was not published and appears in the appendix hereto (App. 36a - 37a).

STATEMENT OF JURISDICTION

The court of appeals entered its summary order on January 12, 2004 and entered its denial of Cibao's petition for rehearing on April 22, 2004. Cibao invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

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[1]Citations to "App." are to the appendix filed with this petition for writ of certiorari pursuant to Supreme Court Rule 14(i). Citations to "Apx." are to the joint appendix filed in the Court of Appeals for the Second Circuit in this case.

RELEVANT STATUTES INVOLVED

Section 7 of the NLRA, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities ....

Section 8(a) of the NLRA, 29 U.S.C. § 158(a):

> It shall be an unfair labor practice for an employer–
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7] ....

STATEMENT OF CASE

A Factual Background

This case resulted from petitioner's decision to suspend employee Mario Mendez for one day and to discharge three others, Jose Luis Mendez, Cayetano and Modesto Flores.

Cibao is engaged in the processing and non-retail sale of meat products. App. 14a. Cibao employs about 30 production employees at its facility in Bronx, New York. App. 15a. During the events involved in this case, Cibao's employees were not represented by a labor organization. App. 28a.

i. Mario Mendez's suspension

On the morning of January 17, 2000, at the direction of Lutzi Vieluf Isidor, Cibao's Vice President, Quality Control Manager Elizabeth Sandner held a meeting with employees about the requirement that they open the plant gate in the morning. During the meeting, employee Mario Mendez announced that he would rather go home than open the gate[2]. App. 16a, Apx. 35, 42, 47, 55-56, 62, 66, 72. After the meeting, Ms. Sandner informed Ms. Isidor, who did not attend the meeting, about Mario's announcement. Upon hearing of Mario's statement, Ms. Isidor immediately announced over the plant intercom that he was suspended for one day. App. 16a. Mario Mendez never returned to work after January 17, 2000. App. 7a.

ii Discharge of Jose Luis Mendez and the Flores brothers

On the evening of January 17, Heinz Vieluf, Cibao's president, returned to the United States from a business trip. App. 18a - 19a. He learned of the plant gate incident and Mario's suspension. He told Ms.

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[2]Petitioner contests the Board's finding of fact as not supported by substantial evidence. *See* Point III *infra*.

Isidor to fire employees Cayetano Flores, Modesto Flores and Jose Luis Mendez. At the time, he did not give her a reason for the discharges. App. 17a. These employees are interrelated. Mario Mendez and Jose Luis Mendez are brothers. Modesto Flores and Cayetano Flores are also brothers. App. 22a - 23a. Mr. Vieluf later explained that he ordered the discharge of Modesto Flores because he disobeyed an order not to harass a mentally challenged, "slow" employee. Apx. 88. He explained that he ordered the discharge of Cayetano Flores and Jose Luis Mendez because they worked together with the meat and he felt that they might do something to the product in response to Mario's suspension. Apx. 86-87.

B The ALJ's Conclusions

After a hearing, the administrative law judge (ALJ) found that by protesting Cibao's "new" policy[3], Mario Mendez engaged in protected, concerted activity and that he was admittedly suspended for such activity. App. 22a. The ALJ rejected petitioner's contentions that Mario Mendez had not engaged in concerted activity and that even if he did engage in concerted activity, petitioner had no knowledge of the concerted nature of such activity. App. 22a. In deciding the case with respect to Mario Mendez's suspension, the ALJ cited Board and court precedent holding that in a group meeting context, a concerted objective may be inferred from the circumstances. App. 21a. The ALJ further

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[3]Petitioner contests the Board's finding that Mario protested a "new policy" because it is not supported by substantial evidence in the record. See Point III, *infra*.

held that Mario Mendez had been constructively discharged because to require him to return to work after petitioner had fired his brother and two brothers-in-law satisfied the elements of that theory. App. 23a.

Concerning the discharges of Cayetano Flores, Modesto Flores and Jose Luis Mendez, the ALJ concluded that "the primary reason for the discharge of Jose Luis Mendez and the Flores brothers was Heinz Vieluf's belief that they might protest Mario Mendez's suspension in a manner that would affect their work". The ALJ further concluded that Heinz Vieluf believed that a family relationship was a sufficient basis to assume that these employees would act concertedly and that they were discharged for such reasons. App. 23a.

The ALJ rejected petitioner's contentions that Modesto Flores was fired because he disobeyed an order not to harass a "slow" employee. App. 26a - 27a. The ALJ also rejected petitioner's contention that Cayetano Flores and Jose Luis Mendez were fired because Mr. Vieluf believed that these employees might sabotage his meat products. App. 25a - 26a.

Therefore, the ALJ ruled that Mario's refusal to open the plant gate came within the protection of Section 7. The ALJ further ruled that Jose Luis Mendez and the Flores brothers were unlawfully discharged due to petitioner's belief that they might protest Mario's suspension in a manner that would affect their work and because Mr. Vieluf believed that a family relationship was a sufficient basis to assume that they would act concertedly.

C The Board's Decision

Petitioner timely filed exceptions to the ALJ's decision. On April 11, 2003, the Board issued its Decision and Order. The Board adopted the ALJ's decision that Mario Mendez had been unlawfully suspended based upon its precedents involving the "concerted" nature of activity of single employees in the group meeting context. The Board rejected the ALJ's conclusion that Mario had been constructively discharged. App. 6a-8a.

The Board also adopted the ALJ's decision that petitioner unlawfully discharged Jose Mendez, Cayetano Flores and Modesto Flores holding that petitioner believed that these employees would act concertedly in the protected endeavor of protesting Mario Mendez' unlawful suspension. App. 13a.

The Board filed an application for enforcement of the Decision and Cibao cross-petitioned for review.

D The Decision of the Court of Appeals

Upon review, in a Summary Order dated January 12, 2004, the Second Circuit granted the Board's application for enforcement and denied petitioner's cross-petition for review. In so ruling, the court acknowledged that the Board adopted the ALJ's findings that petitioner unlawfully imposed a one-day suspension on Mario Mendez for engaging in concerted, protected activity and "impermissibly terminated three other employees whom it feared would protest the suspension." App. 2a. The court held that the Board's legal conclusions were "reasonably based" and that

"substantial evidence supports its factual findings". App. 2a.

In an order dated April 22, 2004, the court denied petitioner's timely filed petition for panel rehearing. App. 36a.

REASONS FOR GRANTING THE WRIT

This petition involves questions of exceptional importance to the administration of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) ("NLRA" or the "Act"), namely whether Section 8(a)(1) of the Act can be used to punish employers for discharging employees based upon a Board finding that an employer believed that employees might engage in concerted activity where the Board failed to identify specific concerted activity that the employer feared that employees intended to engage in. In *Meyers Industries ("Meyers I")*, 268 NLRB 493, 497 (1984), the Board held that the proper analysis for determining a violation of Section 8(a)(1) is to first decide whether employee activity is concerted. If it is, then the Board must determine whether the employer knew of the concerted nature of the employee activity, whether the concerted activity is protected by the Act and whether the employee's discharge was motivated by his protected, concerted activity.

But, in the present case, the Board, in conflict with its own precedent held that petitioner violated Section 8(a)(1) of the Act by discharging three employees without identifying specific concerted activity that petitioner allegedly feared that these

employees intended to engage in. By holding that petitioner violated Section 8(a)(1) without identifying specific concerted activity, the Board has extended the reach of that Section to allow for punishing employers for Section 8(a)(1) violations based upon the mere articulation that the employer believed that employees will engage in concerted activity.

The effect of the Board's decision is to require an 8(a)(1) violation in all situations where employers fear that employees intended to engage in concerted activity—irrespective of whether the feared employee conduct is protected or unprotected by the Act. The Board's decision and order significantly departs from the common understanding of employee rights under Section 7, 29 U.S.C. § 157, of the Act, and radically expands the scope of Section 8(a)(1) to permit the Board to punish employers for disciplining employees based on a belief that they intended to engage in unidentified concerted activity that may be unprotected.

The second issue of importance to the administration of the Act raised in this case is whether the Board has effectively established a *per se* rule that employee protest statements made during meetings called by the employer are presumed to be of interest to other employees and, thus, is protected, concerted activity. In *Whittaker Corp.*, 289 NLRB 933, 934 (1988), the Board held that "in a group-meeting context, a concerted objective may be inferred from the circumstances." As applied, in this case and in others, the Board has found employee statements to be "concerted activity" irrespective of whether the record as a whole established that the employee acted with or

expressly on behalf of one or more of the other employees and irrespective of whether the record shows that the employee in question had the proven object of inducing, initiating or preparing for group action. *See e.g. Caval Tool Div.*, 331 NLRB 858 (2000), enf'd *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2d Cir. 2001). The *Whittaker* rule allows the Boad to presume rather than prove that the vocal employee's speech was of interest to other employees attending the meeting. The effect of the "rule" as applied is at least twofold: (1) it creates a chilling effect upon employer rights to maintain discipline and order in the workplace. Employers risk Section 8(a)(1) liability *every time* they hold a group employee meeting and a single employee decides to challenge management's authority to operate its business and to promulgate work rules; and (2) it renders employers impotent to control employee conduct during employee meetings.

Finally, this petition should be granted, too, because the Board's factfinding and its conclusions were unreasonable and not supported by substantial evidence where critical facts were fabricated to support a preferred result.

I. BEFORE PUNISHING AN EMPLOYER FOR A SECTION 8(a)(1) VIOLATION, THE BOARD MUST SHOW THAT SPECIFIC EMPLOYEE CONDUCT WAS CONCERTED AND THAT THE EMPLOYER WAS AWARE OF THE PROTECTED NATURE OF THE ACTIVITY

A The Board failed to establish the concerted nature of specific employee activity

The Board's decision radically and significantly expands the meaning and scope of Section 7 of the Act. The decision holds that Section 8(a)(1) can be used to punish an employer who believes that employees may engage in concerted activity without reference to a specific concerted activity. The decision erroneously holds an employer liable for an 8(a)(1) violation irrespective of whether the unidentified concerted activity is protected or unprotected by the Act.

Previous decisions of the Board, this Court and the courts of appeals have consistently held that Section 8(a)(1) is violated only after determining whether the activity in question is concerted and, even then, only if the employer knew, among other things, that the concerted activity was protected by the Act. *Meyers I*, 268 NLRB at 497. By extending the reach of an 8(a)(1) violation to employers who simply believe that employees may act in a concerted manner without identifying specific activity that employees intended to engage in, the Board transformed the Act into a vehicle to punish employers for curbing employee concerted activity even if the employer's conduct was taken for

reasons justified by the Act.

Section 7 of the Act provides, in pertinent part, that:

> Employees shall have the right . . . to engage in other concerted activities for the purpose of . . . mutual aid or protection[.]

29 U.S.C. 157. The right to engage in "concerted activity" is protected under the Act by Section 8(a)(1) which provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). Section 7, as enforced by Section 8(a)(1) requires a finding that an employer interfered with an identifiable activity before a violation is found. In *Meyers I*, 268 NLRB 493 (1984), the Board held that the first step in deciding whether an employer violated 8(a)(1) of the Act is to prove that the employee conduct in question is concerted. *Id.* at 497. If it is, the Board must further prove, *inter alia*, that the concerted activity at issue is protected by the Act and whether the employee's discharge was motivated by the employee's protected activity. *Id.* Of course, the Board cannot find activity to be concerted if it has not identified specific activity that the employer believes that its employees intends to engage in. The Board cannot determine if certain employee conduct is protected by Section 7 if it has not identified the conduct at issue. The Board cannot determine if an employee's discharge was motivated by his protected, concerted activity if the conduct at issue has not been identified.

An employee's right to engage in concerted activity is not an unlimited one. To be protected by the Act, conduct must be both concerted and protected. See *NLRB v. Local Union No. 1229, Intl. Bhd. of Elec. Workers*, 346 U.S. 464, 477 (1953)(observing that even if the Board treated certain conduct as concerted activity wholly or partly within the scope of Section 7, the means used to engage in the conduct may deprive the employees of section 7 protection)(citing cases). Employees who engage in concerted activity that is not for the purpose of mutual aid and protection of the employees' interests are not protected under the Act. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-568 (1978). Thus, the determination of whether an activity is protected depends upon its purpose. *Ewing v. NLRB*, 861 F.2d 353, 357-362 (2d Cir. 1988).

Discipline or discharge based on an employer's belief that an employee engaged in or intended to engage in protected, concerted activity for mutual aid and protection violates the Act. *NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21, 23 (1964), *JCR Hotel v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003), *United States Services Indus., Inc.*, 314 NLRB 30, 31 (1994), *Owens Illinois, Inc.*, 290 NLRB 1193, 1204 (1988). Conversely, discipline or discharge based on an employer's belief that an employee engaged in or intended to engage in unprotected activity even if concerted does not violate the Act. 29 U.S.C. § 157; *NLRB v. Kaye*, 272 F.2d 112, 114 (7th Cir. 1959)(holding that the employer had a lawful basis for the discharge if it acted on information that the employee was engaged in the slowing of production, even though such information was incorrect.); *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1055 (7th Cir. 1975)(holding that if the company

acts upon erroneous information that, if true, would justify its conduct, no violation of the Act occurs); *Meyers Industries, Inc. ("Meyers I")*, 268 NLRB 493, 497 n. 23 (1984)(observing that there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct), *Charles Kaye, et al and Local 7*, 122 NLRB 890, 899 (1959)(observing that if the employer in fact discharged the employee for believing that he interfered with production, it would not be unlawful even if the employer's belief in regard thereto was incorrect.). The relevant issue is what the employer believed about the purpose of the employee's conduct. *Henning & Cheadle*, 522 F.2d at 1053.

Despite well settled case law holding that to be protected by Section 7 employee conduct must be both protected and concerted, the Board held in this case that Section 8(a)(1) can be used to punish employers based only upon a finding that the employer believed that employees might protest a co-workers suspension in an unidentified manner that would affect their work. There is no support for the Board's radical extension of Section 7, as enforced by Section 8(a)(1) and the Board does not offer any. In footnote 12 of its decision and order, the Board attempted to justify its conclusion that petitioner unlawfully discharged Jose Luis Mendez and the Flores brothers by assuming a fact that the General Counsel failed to prove: that petitioner believed that these employees would engage in protected, concerted activity. *See* App. 12a - 13a.

The Board rejected Mr. Vieluf's explanation for the discharges, including his belief that the discharged employees would sabotage his meat products but failed

to identify any other conduct that Mr. Vieluf believed that the discharged employees intended to engage in. This is not an insignificant omission. The Board's failure to identify the alleged concerted conduct leaves the Board to resort to pure speculation as to (1) the concerted activity petitioner allegedly intended to interfere with, and (2) whether the alleged concerted activity is protected under the Act. Such speculation is insufficient to support a finding of liability under the current state of the law. *See e.g. NLRB v. Arthur Winer, Inc.*, 194 F.2d 370, 374 (7th Cir. 1952)("The Board is not permitted to substitute its guess, unsupported by evidence, for the declared purpose, intention or reason of the employer, and to thus convict the employer of an unfair labor practice.").

B The Board failed to establish the petitioner was aware of the protected nature of the intended, unidentified employee activity

The Board's decision, as enforced by the court of appeals, also conflicts with longstanding Supreme Court, courts of appeals and Board precedent holding that the employer must be aware that the discharged employee was engaged in a protected activity. An employer can be held liable for a violation of 8(a)(1) only if, among other things, the employer was aware that the discharged employee was engaged in a protected activity. *Burnup and Sims, Inc.*, 379 U.S. 21, 23 (1964); *Air Surrey Corp. v. NLRB*, 601 F.2d 256, 257 (6th Cir. 1979) ("[A]n employer cannot be held in violation of §8(a)(1) of the Act when it discharges an employee for activity which may in fact be protected under the Act but the employer lacks knowledge of its protected

character."); *NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 840 (2d Cir. 1953)(explaining that it found the Board's conclusion that the employee was discharged because she engaged in concerted activity "impossible to accept" when "the employer was wholly ignorant of the fact which the Board holds to be a cause of the discharge"); *NLRB v. Westinghouse Elec. Corp.*, 179 F.2d 507, 509 (6th Cir. 1949)(denying enforcement of Board's order observing that the "evidence does not disclose any knowledge on the part of the employer or its supervisors of any concerted activity or of [the employee's] participation in such activity). *Kysor/Cadillac Div., Kysor Indus. Corp.*, 309 NLRB 237 (1992)(observing that "[a]s soon as the Respondent was factually aware or put on notice that the employees were making a concerted inquiry, the Section 7 protections of the Act attached to the employee conduct[.]").

The Board's decision in this case does not meet the required legal mandate. Since the Board failed to identify any specific concerted activity petitioner allegedly feared that the discharged employees intended to engage in, the Board necessarily failed to prove that petitioner was aware of the protected nature of the unidentified conduct. Holding an employer financially liable for a violation of the Act based upon speculated, unidentified concerted activity radically expands the reach of Section 7 and undermines this Court's pronouncements that unprotected activity, even if concerted, will not support an 8(a)(1) violation. *See e.g. NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984)(holding that the fact that an activity is concerted does not necessarily mean that an employee can engage in the activity with impunity because an

employee may engage in concerted activity in such an abusive manner that he loses the protection of Section 7); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. at 23 (holding that section 8(a)(1) is violated if it is shown, among other things, that the discharged employee was at the time engaged in a protected activity and that the employer knew it was such).

II. THE BOARD FAILED TO SHOW THAT MARIO MENDEZ ENGAGED IN PROTECTED, CONCERTED ACTIVITY AND FAILED TO SHOW THAT PETITIONER WAS AWARE OF THE PROTECTED, CONCERTED NATURE OF HIS CONDUCT

A Mario did not engage in protected, concerted activity

In this case, Mario Mendez announced that he would rather go home than perform an assigned task. The Board's decision and order provides protection to Mario who spoke solely for his own benefit only because he made his statements during an employee meeting. The Board ignored Mario's lack of authority, implied or actual, to refuse to perform the assigned task of opening the plant gate on behalf of other employees. In order to provide evidence that employees at the meeting authorized, consented to or approved of Mario's comments, the ALJ (and, thus, the Board) fabricated evidence that Mario testified that after he spoke at the meeting, he noticed some of the other employees nodding agreement with him. App. 16a. But, Mario never gave any such testimony during the

hearing. Apx. 56-59 (166-180).[4] In *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984), this Court specifically observed that the Board held in *Meyers I* that "where a group of employees are not unionized and there is no collective-bargaining agreement, an employee's assertion of a right that can only be presumed to be of interest to other employees is not concerted activity." *Id.* at 829 n.6. This case challenges this Court's understanding of the rule established in *Meyers I*. The Board is now holding that an employee who speaks out at an employee group meeting is *per se* engaging in concerted activity. Thus, the General Counsel is no longer required to prove that the vocal employee acted with authority on behalf of other employees. The Board is now holding that as a matter of law an employee who speaks out during an employee group meeting has done so with the object of initiating or inducing or preparing for group action—even in the absence of evidence that the issue was important to anyone other than the speaker. Group employee meetings are not debating contests. But, by presuming that employees who speak out during group meetings are authorized to speak out on behalf of other employees and by presuming that the speech was made with the proven object of initiating, inducing or encouraging group action, employers are powerless to discipline employees who openly challenge their authority to promulgate rules and otherwise run their operation. Such an interpretation of Section 7 eliminates employer rights under the Act to discipline employees for cause.

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[4] *See* Part III *infra*.

B Petitioner was unaware of the concerted nature of Mario's speech

The Board found that Mario Mendez engaged in protected, concerted activity when he announced during a group meeting that he did not want to open the plant gate as ordered and that he did not want to abide by petitioner's policy. App. 16a. The Board further found that Ms. Sandner informed Ms. Isidor, who did not attend the meeting, that Mario Mendez did not want to open the gate and abide by the new policy[5]. Ms. Isidor suspended Mario for one day. App. 16a. Even if this Court finds that Mario Mendez engaged in protected, concerted activity, the Board's decision is still contrary to law because it ignores long standing precedent holding that the petitioner must be aware of the concerted and protected nature of the employee's conduct to be held in violation of Section 8(a)(1).

In *Air Surrey Corp.*, 601 F.2d 256 (6th Cir. 1979), four employees, concerned about the employer's financial position, agreed to visit the employer's bank for the purpose of determining whether sufficient funds was in its account to cover payroll. *Id.* at 257. Later that day, a company official learned through his wife that an employee had inquired about the employer's account. *Id.* All employees, except one, denied involvement in the plan. The employer fired the lone employee who admitted visiting the bank. *Id.* The court observed that "an employer cannot be held in violation of s 8(a)(1) of the Act when it discharges an

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[5]Petitioner objects to the characterization of the order as a "new policy". See Point III infra.

employee for activity which may in fact be protected under the Act but the employer lacks knowledge of its protected character." 601 F.2d at 257. "It is the employer's knowledge of an employee's protected activity and his subsequent discharge of the employee for engaging in such activity which violates the Act." *Id.*

Applying these principles, the Sixth Circuit concluded that the discharged employee was acting on behalf of himself and the three other employees when he made inquiries at the bank and, therefore, his conduct would be protected under the Act. *Id.* at 258. But, the court found that the record did not display substantial evidence that the company official was aware of the concerted nature of the activity when he discharged the employee. *Id.* The court observed that the record established that the company official was aware that the discharged employee had gone to the bank but it did not reflect that the official knew that the discharged employee was acting on behalf of other employees. *Id.* Thus, the court denied the Board's petition for enforcement of its order holding that the employer had violated the Act when it discharged the employee. *Id.* at 257-258.

Similarly, in *NLRB v. Office Towel Supply Co., Inc.*, 201 F.2d 838 (2d Cir. 1953), the court rejected the Board's finding that an employee was unlawfully discharged because she engaged in concerted activity where "the employer was wholly ignorant of the fact which the Board holds to be a cause of the discharge." *Id.* at 840. At the time of the employee's discharge, the employer did not know that the employee had been engaged in union activity. *Id.*

The holdings in *Air Surrey* and *Office Towel* support reversal of the Board's decision as enforced by the court of appeals. The record does not reflect that Ms. Isidor, who did not attend the group meeting, was aware of the concerted nature of Mario's activity when she suspended him for one day. Even if Ms. Sandner knew of the protected, concerted nature of Mario's conduct, her knowledge may not be imputed to Ms. Isidor in the same manner that coercive statements are ascribable to the employer. *Cowlitz Veneer Company*, 135 NLRB 299, 305 (1962)(holding that an agent's knowledge of concerted activity may not be imputable to their principal in the same manner that coercive statements are ascribable to the employer).

Ms. Sandner informed Ms. Isidor that Mario Mendez stated that he would rather go home than open the gate. The record does not reflect that Ms. Isidor knew that Mario was acting on behalf of other employees. Unless the Board has established a *per se* rule in this case that employee refusals to perform assigned duties made in a group meeting context, standing alone, equals protected, concerted, activity, Mario Mendez's statement, standing alone, does not support a finding that Ms. Isidor knew that Mario engaged in protected, concerted activity. The record does not reflect that Ms. Isidor was aware that other employees agreed with Mario's comments. Lacking any evidence to indicate that Ms. Isidor had knowledge of the concerted nature of Mario's conduct, the Board implicitly based its evidence of awareness of protected, concerted activity on nothing more than the fact that the statement was made during a group meeting. Mario's refusal to abide by existing policy was nothing more than garden variety insubordination for which

Ms. Isidor had a right to impose discipline.

III. THE BOARD'S FACTUAL FINDINGS ARE UNREASONABLE AND UNSUPPORTED BY THE RECORD AS A WHOLE WHERE THE BOARD FABRICATED FACTS AND ITS FINDINGS ARE SELF-CONTRADICTORY

Factual findings of the Board will be upheld so long as they are reasonable and supported by substantial evidence from the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). A "Board decision is deemed supported by substantial evidence when, on the relevant record, a reasonable jury could have reached the same conclusion. *Id.* at 477. Substantial "'evidence means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* In reviewing a Board decision under the "substantial evidence" standard, "a reviewing court must not only consider the evidence used to support the Board's factual conclusion, but it must also take into account whatever in the record fairly detracts' from the Board's factfinding." *Universal Camera*, 340 U.S. at 487-488. Courts frown upon factfinding that disregards evidence to support a preferred result. *See e.g. New York University Medical Center v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998).

In this matter, the factual findings upon which the ALJ based its decision demonstrates his intent to reach a preferred result. Critical "facts" relied upon to support his conclusions simply do not exist. The Board adopted the ALJ's concocted findings as its own. Thus it would be impossible for a reasonable jury to reach

the same conclusion as the Board's.

For instance, the Board found that Ms. Elizabeth Sandner, informed Ms. Isidor that Mario Mendez did not want to abide by the "new policy" she had ordered. App. 16a. But, there is no support in the record for this finding. Ms. Sandner did not announce a "new policy". It is undisputed that Ms. Sandner announced that disciplinary action would be forthcoming to any employee who failed to abide by existing practice. Apx. 35 (91-92). Similarly, Ms. Sandner never told Ms. Isidor that Mario refused to abide by any "new policy". Apx. 35 (92)[6]. She told Ms. Isidor that Mario "doesn't want to open it, he's not going to open it, [a]nd he prefers to go home". Apx. 35 (92). The Board's "new policy" finding was concocted undoubtedly to support an inference that Mario Mendez protested a change in his working conditions during the group meeting. Refusal to abide by petitioner's existing policies is insubordination and is not protected by the Act.

The Board also found that Mario testified that after he spoke to Ms. Sandner, he noticed some of the other employees nodding agreement with him. App. 16a. But, the Board relied upon fictitious testimony to make this finding. Mario never testified in this manner. Apx. 56-59 (166-180). Again, the Board based its factfinding upon concocted evidence to support an inference that Mario Mendez engaged in concerted activity by speaking on behalf of the group.

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[6]The number in parentheses reflects the transcript page number.

The Board found that Cayetano Flores "calmly" spoke up at a meeting in support of Mario Mendez and that another alleged employee, Raphael Deleano, reiterated that opening the gate was security's function. App. 21a. But, Ms. Isidor, Ms. Sandner and Mr. Pulinario (the only totally disinterested testifying witness) all testified that after Ms. Isidor spoke to the employees later in the day, no one else spoke. Apx. 36 (94), 43 (121), 74 (238). The Board found Mr. Pulinario to be a credible witness when he testified against petitioner's interests but apparently not so credible when his testimony benefitted petitioner. *See* App. 23a. Moreover, the characterization that Cayetano spoke to Ms. Isidor "calmly" is fictitious and not to be found in the record. The ALJ made up the characterization that Cayetano Flores spoke "calmly" to support an inference that his manner of alleged protest was reasonable.

The Board found that Mr. Vieluf did not deny having a conversation with Mr. Andres Pulinario wherein Mr. Vieluf told Pulinario that "Jose Luis Mendez 'was an agitator within the company;' therefore, he must be terminated." Apx. 146, 165. The Board also found that Mr. Vieluf did not deny saying to Mr. Pulinario that "because Cayetano Flores is the brother-in-law of Jose Luis Mendez, then he quite possibly could have the same ideas he had to be terminated, Apx. 146, and finally that because Modesto Flores is the brother of Cayetano Flores, he may have the same ideas as well. App. 23a-24a. This finding is simply not true. Mr. Vieluf explicitly denied having such a conversation. Apx. 81 (266). The Board further found that Mr. Vieluf testified that Jose Luis Mendez was discharged because Mr. Vieluf suspected that Jose may have been responsible for improperly mixing a

batch of meat in July 1999. App. 25a. Mr. Vieluf never said this. Apx. 28 (62), 80 (264-265), 86 (286). Yet, the Board used these erroneous findings to hold that Mr. Vieluf was not a credible witness to reject his explanation that he feared that the discharged employees would engage in unprotected sabotage of his meat products. App. 25a.

The Board found that Mr. Vieluf admitted that he fabricated reasons for discharge depending on the circumstances. App. 25a. Mr. Vieluf never said this either. Apx. 28 (62-63), 81 (267). According to the Board, Mr. Vieluf admitted that when an incident between two employees occur, both receive the identical reprimand or discipline. App. 27a. Mr. Vieluf never admitted to any such practice. Apx. 83-84 (276-278). In fact, Mr. Vieluf explicitly testified to the exact opposite. Apx. 82.

The Board found that the alleged discriminatees received a letter stating that they were laid off "pursuant to directions from Mr. Vieluf". App. 24a. But, Mr. Vieluf never testified that he told Ms. Isidor to give the alleged discriminatees a letter stating that they were laid off, Apx. 27 (60), and the record is void of evidence to support this finding. Yet, the Board uses this fictitious testimony to hold that Mr. Vieluf was not a credible witness. App. 25a.

Finally, the Board's findings are self-contradictory and, thus, unsupportable. The Board finds "unbelievable" Mr. Vieluf's testimony that "he was concerned because Jose Luis Mendez and Cayetano Flores had a family relationship" and, also unbelievable, Mr. Vieluf's concern as to how Cayetano might act

because of his brother's discharge. App. 25a-26a. But, the Board credits this very testimony to find a violation of the Act based on Mr. Vieluf's alleged belief that these family members would act concertedly. App. 23a. The self-contradictory nature of these findings render them unreliable. See, e.g., *Conair Corp. v. NLRB*, 721 F.2d 1355, 1367-1368 (D.C. Cir. 1983)(observing that Board's resolution of factual conflicts should be upheld unless they are "hopelessly incredible" or "self-contradictory"). In sum, a thorough review of the evidence in the record as a whole reveals that substantial evidence does not exist for many of the critical facts relied upon by the Board to reach its decision. This is so because many of the facts leading to critical conclusions and inferences were fabricated. The Board adopted these findings. The court of appeals' enforced the Board's decision and order without explaining how facts that were fabricated can provide substantial evidence to support its findings. A manifest injustice has occurred that should be remedied by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

(Any footnotes trail end of each document)

03-4997, 03-40023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Cross-Respondent,

-v.-

CIBAO MEAT PRODUCTS,
Respondent-Cross-Petitioner.

January 12, 2004, Decided

COUNSEL: FOR PETITIONER: KATHLEEN E. LYON, National Labor Relations Board, Washington, D.C. (Arthur F. Rosenfeld, John E. Higgins, Jr., John H. Ferguson, Aileen A. Armstrong, Fred L. Cornnell, of counsel).

FOR RESPONDENT: IRENE DONNA THOMAS, Thomas & Associates, Brooklyn, NY.

JUDGES: PRESENT: HON. DENNIS JACOBS, HON. CHESTER J. STRAUB, Circuit Judges, HON. GREGORY W. CARMAN, Judge. *

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the

application for enforcement be GRANTED and the cross-petition for review be DENIED.

The National Labor Relations Board (the "Board") applies to this Court for enforcement of its Decision and Order dated April 11, 2003, and Cibao Meat Products ("Cibao") cross-petitions for review. The Board adopted the ALJ's findings that Cibao impermissibly imposed a one-day suspension on Mario Mendez for engaging in a concerted, protected activity and impermissibly terminated three other employees whom it feared would protest the suspension. Among other things, the Board ordered Cibao to reinstate the three terminated employees, make whole those three employees as well as Mario Mendez (for the one day), and cease and desist from interfering with its employees' rights to engage in protected, concerted activities.

This Court's "review of Board orders is quite limited." NLRB v. Katz's Delicatessen, Inc., 80 F.3d 755, 763 (2d Cir. 1996). "We must enforce the Board's orders where its legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole." Id. Both standards are extremely deferential. See, e.g., NLRB v. Caval Tool Div., 262 F.3d 184, 188 (2d Cir. 2001). Cibao argues for alternative findings and inferences that were available and permissible. But the Board's legal conclusions are reasonably based, and substantial evidence supports its factual findings.

Accordingly, the application to enforce the Board's order is hereby GRANTED, and the cross-petition for review is DENIED.

Footnote

* The Honorable Gregory W. Carman, Judge, United States Court of International Trade, sitting by designation.

Case 2-CA-32811

NATIONAL LABOR RELATIONS BOARD

Cibao Meat Products and Local 169, Union of Needletrades, Industrial and Textile Employees, AFL-CIO.

April 11, 2003

DECISION AND ORDER

By Peter C. Schaumber, Member; Dennis P. Walsh, Member; R. Alexander Acosta, Member

COUNSEL:
Rita C. Lisko, Esq. and Christian R. White, Esq., for the General Counsel.

Irene Donna Thomas, Esq. (Thomas & Associates), for the Respondent.

Stuart Lichten, Esq., for the Charging Party.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

On August 17, 2001, Administrative Law Judge Howard Edelman issued the attached decision. Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's findings n1 and conclusions except as set forth below and adopts the recommended Order as modified herein. n2

The judge found that Respondent violated Section 8(a)(1) by suspending employee Mario Mendez for 1 day. As more fully set forth in the judge's decision, Respondent suspended Mendez on January 17, 2000, for insubordination because he spoke up at an employee meeting called by Respondent that day. At the meeting, Supervisor Elizabeth Sandner informed the assembled employees that they were required to help open the plant gate in the morning before they started work. Mendez responded that it was not his job to open the gate, it was security's job, and that "we are the workers, the employees, after you open the factory." Sandner did not interrupt Mendez or ask him to stop speaking. The meeting took place after the gate was opened for the day by an employee and there was no evidence introduced that either Mendez or any other employee failed or refused to open the gate after having been directed to do so by Sandner. Respondent excepts, however, claiming, among other things, that Mendez' actions were unprotected insubordination rather than

protected, concerted activity, as the judge found them to be. We disagree.

It is well-settled Board law that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." n3 Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing . . . group action . . . ." n4 "*Particularly in a group-meeting context, a concerted objective may be inferred from the circumstances.*" n5 Thus, an employee, like Mendez, who protests, in the presence of other employees, a change in an employment term affecting all employees just announced by the employer at an employee meeting, is engaged in the "initiation of group action as contemplated by the *Mushroom Transportation* line of cases . . . ." n6

The Board has specifically rejected the contention advanced by Respondent that an employee who protests a management decision at an employee meeting called to announce that decision is guilty of unprotected insubordination if the employer did not first solicit the employee's views. n7 Contrary to Respondent's contention, the protected, concerted nature of such protests does not depend on whether the employer has solicited the grievance of the employees at the meeting. n8

To be sure, we are sensitive to the fact that an employee's right to engage in concerted activity must be balanced against the employer's right to maintain order and respect. n9 We recognize that even an employee who is engaged in concerted activity may, by conduct that is sufficiently egregious or offensive, lose

the protection of the Act. n10 There is no indication in the record, however, that Mendez' statement was an intemperate outburst in response to Respondent's directive, that it was disruptive or that it was otherwise so egregious or offensive as to forfeit the protections of the Act. n11 Under these circumstances, we sustain his right to make it.

The judge found that Respondent constructively discharged Mario Mendez, who did not return to work after his unlawful suspension on January 17, 2000. The judge found that when Respondent unlawfully discharged employees Jose Luis Mendez, Cayetano Flores, and Modesto Flores the following day--a finding we adopt n12--it placed an intolerable burden on Mario Mendez and that therefore he was constructively discharged. We do not adopt the judge's constructive discharge finding. Without regard to whether the judge's finding was supported by substantial evidence and otherwise in accord with the law, the complaint never alleged a constructive discharge and Respondent was never placed on notice at the hearing that the General Counsel was so contending. On the contrary, during the hearing, when the General Counsel characterized Mendez' loss of employment as a "termination," Respondent objected and raised the issue as to whether the General Counsel was arguing a constructive discharge. In response, the judge ruled that "the complaint alleges a suspension and that's what it is." The General Counsel replied, "Yes, Your Honor. And we acknowledge that his employment terminated as of that day. He did not go back to work after that day." Consequently, since the contention was never alleged in the complaint and was not fully or

fairly litigated, we reverse the judge's finding in this regard. n13

ORDER

The National Labor Relations Board orders that Respondent, Cibao Meat Products, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or laying off its employees because of their protected, concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jose Luis Mendez, Cayetano Flores, and Modesto Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mario Mendez, Jose Luis Mendez, Cayetano Flores, and Modesto Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that

the suspension and discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Bronx, New York facility copies of the attached notice marked "Appendix."n14 Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 17, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

attesting to the steps that Respondent has taken to comply.

Footnotes

n1 Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We further find that the judge's factual findings are amply supported by the record evidence, and we reject as unfounded Respondent's arguments to the contrary.

Some of Respondent's exceptions are that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. We are satisfied on a review of the record that Respondent's contentions are without merit. For example, Respondent contends that the judge exhibited bias by granting the General Counsel's motion to reopen the record. In his answering brief, counsel for the General Counsel asserts that he made a verbal and written motion to reopen the record for the purpose of entering disciplinary records into evidence, but that the General Counsel "is unaware that either its oral or written motion to reopen the record has been granted by the ALJ." The record does not contain any post-hearing motion to reopen the record, or any indication that such a motion was granted. Consequently, there is no basis for finding that the judge was biased by granting the General Counsel's motion.

n2 We modify the judge's recommended Order and notice consistent with our decisions in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001), and *Ferguson Electric Co.*, 335 NLRB No. 15 (2001), to conform more closely to the Board's usual remedial provisions.

The remedy section of the judge's decision inadvertently states that Respondent has violated Sec. 8(a)(1) and (3). The judge found elsewhere in his decision that Respondent did not violate Sec. 8(a)(3) and there are no exceptions to that finding.

n3 *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

n4 *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

n5 *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (emphasis added).

n6 Id. Accord: *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

n7 *Whittaker Corp.*, supra.

n8 *NLRB v. Talsol Corp.*, 155 F.3d 785, 796-797 (6th Cir. 1998), enfg. 317 NLRB 290 (1995) (employee who challenged management speaker about safety issues at employer-called employee meeting was engaged in protected, concerted activities; no evidence statements or questions were solicited); *CKS Tool & Engineering, Inc.*, 332 NLRB 1578, 1586 (2000) (employee who challenged management statements, at employer-called meeting of employees, was engaged in protected,

concerted activity; no evidence that comments or questions were solicited).

n9 *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (grievance committeeman did not lose the protection of the Act where he made an impulsive, derogatory remark to an employer representative in a grievance meeting which was heated on both sides).

n10 See *United Parcel Service*, 311 NLRB 974 (1993).

n11 Cf. *J.P. Stevens & Co.*, 219 NLRB 850 (1975), enfd. 547 F.2d 792 (4th Cir. 1976) (employee's statement, at captive audience speech, that a coworker's question should be answered and not ignored held protected, concerted activity; 22 employees who engaged in planned conduct designed to disrupt similar meeting and ignored repeated directions to sit down and stop their disruptions, were not engaged in protected activity).

n12 Member Acosta would hold that the judge improperly relied on *Wright Line* in finding that the Respondent unlawfully discharged employees Jose Mendez, Cayetano Flores, and Modesto Flores. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Member Acosta notes that the judge specifically found that the primary reason for the discharge of Jose Mendez, Cayetano Flores, and Modesto Flores was the belief of the Respondent's owner, Heinz Vieluf, that they might protest the unlawful suspension of Mario Mendez in a manner that would affect their work. The Respondent believed that the family relationship among the three employees was a sufficient basis to assume that they would act concertedly and the Respondent therefore discharged them. Vieluf admitted that Jose Mendez

"was an agitator within the company" and must be terminated; that because Cayetano Flores was the brother-in-law of Jose Mendez, he quite possibly could have the same ideas, and, must also be terminated; and that because Modesto Flores was the brother of Cayetano Flores, he could have the same ideas as well, and must be discharged. Accordingly, because the conduct for which the Respondent claims to have discharged the three employees was protected concerted activity, the *Wright Line* analysis is inappropriate. Such analysis is properly used in resolving cases alleging violations where the respondent's motivation for taking the allegedly unlawful action is disputed. Here, however, it is undisputed that the Respondent discharged Jose Mendez, Cayetano Flores, and Modesto Flores because the Respondent believed they would act concertedly in the protected endeavor of protesting Mario Mendez' unlawful suspension. See *Felix Industries*, 331 NLRB 144, 146 (2000).

n13 *Tri-City Fabricating & Welding Co.*, 316 NLRB 1096 fn. 1 (1995); *Q-1 Motor Express, Inc.*, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995).

n14 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ALJ: HOWARD EDELMAN

ALJ-DECISION:

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 21 and May 22, 2001 in New York, New York.

On February 28, 2001 the above complaint issued based upon a charge filed by Local 169, Union of Needletrades, Industrial and Textile Employees, AFL-CIO, herein called the Union, against Cibao Meat Products, Inc., herein called Respondent alleging violations of Section 8(a)(1) and (3) of the Act.

Based upon the entire record herein, my observation of the demeanor of witnesses, and briefs submitted by Counsel for the General Counsel and Counsel for Respondent, I make the following finding of facts and conclusions of law.

Respondent is a corporation with an office and place of business in the Bronx, New York, where it is engaged in the processing and non retail sale of meat products. During the course of such business Respondent annually sells and ships from its Bronx facility products valued in excess of $ 50,000 directly to points outside the State of New York. Respondent also purchases and receives at its Bronx facility goods and products valued in excess of $ 50,000 directly from points outside the State of New York.

It is admitted, and I find Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I find that the Union is a labor Organization within the meaning of Section 2(5) of the Act.

Respondent employs approximately 30 production employees, and several security employees at its Bronx facility. Respondents owners and officers are Heinz Vieluf and Lutzi Vieluf Isidor. Its quality control manager is Elizabeth Sandner. It is admitted, and I find that the above individuals are supervisors within the meaning of the Act.

On the morning of January 17, Production employees Mario Mendez, Jose Luis Mendez, Modesto Flores and Cayetano Flores arrived to work together at approximately 5:50 a.m. When they arrived, the gate to Respondents entrance was still locked. As usual, they remained in their car and waited for a member of management or a security employee to open the gate. Shortly thereafter, Lutzi Vieluf-Isidor, arrived and unlocked the gate. After unlocking the gate, Lutzi stood and briefly waited for someone to assist her in lifting the gate. Usually, a security guard would assist the member of management in opening the gate. However, on this particular morning, the security guard did not arrive to assist Ms. Vieluf-Isidor, so another employee voluntarily lifted the gate.

After the gate was opened, the employees entered the plant and changed clothes in order to begin the workday. As the employees entered the work area, Elizabeth Sandner, abruptly announced that all of the employees gather for a meeting. Approximately 25 to 30 employees assembled in the production area for the meeting. Sandner stated that Lutzi was very upset that no employee immediately assisted her in opening the gate that morning. She then stated a new policy would be implemented immediately. Employees would be responsible for opening the gate. Previously employees were not required to open the gate. If an employee did

not voluntarily comply, he would be suspended for one day.

At this meeting, after being informed of this new mandatory policy, employee Mario Mendez spoke up and stated that it was not his job to open the gate; rather, it was security's responsibility to open the gate. Mendez then stated to Sandner that "we are the workers, the employees, after you open the factory." Mendez testified that after he made this statement, he noticed some of the other employees nodding agreement with him. Directly after this meeting and announcing the new policy, Sandner spoke with Lutzi and informed her that Mendez did not want to open the gate and abide by the new policy. At that moment, Lutzi announced over Respondent's intercom system, that Mario Mendez was suspended for one day. Upon hearing that he was suspended for one day, Mendez returned to the locker room and went home as ordered.

While Mendez was changing his clothes to go home, the employees who had been assembled for the meeting with Sandner, including Jose Luis Mendez, Cayetano Flores and Modesto Flores, spoke among themselves and decided to speak to Lutzi on behalf of Mario Mendez. When the group of about 30 employees approached Lutzi, she was extremely upset, she asked them if they did not want to work. She insisted that if the employees did not want to work, then she would close the factory down. Cayetano Flores then stated that he definitely wanted to work, but he also wanted Mario Mendez to keep his job. The Raphael Daleano, a security guard, reiterated to Lutzi that, traditionally, opening the gate was the responsibility of security. Lutzi then told the employees that Mario Mendez could return to work tomorrow, but he was still suspended

because "her word had to count for something." After the employees meeting with Lutzi she had a private meeting with Mario Mendez. In her direct testimony, Lutzi admits explaining to him that the reason he was suspended was because he protested the new policy in front of the other employees. She further stated, on cross-examination, that if Marion had spoke with her privately about his concerns with her new policy, she would not have suspended him.

Later that afternoon, the bulk of the employees gathered together in the employee break area to discuss the Mario Mendez suspension and how to better represent themselves with management. Cayetano Flores, accompanied by Jose Luis Mendez and Modesto Flores, initiated the meeting and suggested that when addressing Respondent they should be well prepared and should take detailed notes of Respondent's responses and proposals.

Heinz Vieluf testified that he first learned of the incident with Mario Mendez from Sandner on the afternoon of January 17. That evening he spoke to Lutzi, his sister by phone, who told him about the gate incident and Mario's suspension. He told Lutzi to terminate Cayetano Flores, Modesto Flores and Jose Luis Mendez. He did not give her his reasons for his decision.

On January 18, after the employees reported to work, Jose Luis Mendez, Modesto Flores and Cayetano Flores were summoned into Lutzi's office and were told that they were terminated. When they asked the reason for their termination Lutzi told them she didn't know. Lutzi told them she knew they were "serious and responsible people" Cayetano Flores asked for a

dismissal letter and Lutzi told them to return later that day and pick up their dismissal letters.

Later that day the above employees picked up their dismissal letters and a letter addressed to Mario Mendez. The letters to Cayetano Flores, Jose Luis Mendez and Modesto Flores stated they were temporarily laid off because of lack of work. Mario Mendez's letter stated he was suspended for one day.

The above four employees were long time employees with a combined working time of over 20 years. These employees credibly testified without contradiction that there had never been any layoffs as long as they were employed.

Heinz Vieluf testified that he discharged Jose Luis Mendez because he suspected he may have been responsible for improperly mixing a batch of meat in July 1999. He admitted he had no evidence to support this allegation. He admits that other employees engaged in similar conduct but were not discharged. He also admitted that he discharged Mendez because he might have retaliated against Respondent because of his brothers suspension. Heinz testified he discharged Modesto and Cayetano Flores because they were the brothers-in-law of Jose Luis Mendez and Mario Mendez because he feared "they might take some action" because of the discharge of Jose Luis Mendez.

Heinz also testified he discharged Modesto Flores because of an incident that allegedly occurred on Friday, January 14. He testified that before he left on a business trip that morning, he observed a commotion in the packing area of the plant. When he investigated the disturbance, an employee, Andres Martinez, a/k/a Ramon Guayabo, was wielding a knife at a group of

employees, and that he assumed the incident involved Modesto Flores and decided that evening that he would terminate Mr. Flores when he returned on the following Monday. However, he did not inform anyone of his decision until Monday evening after learning about the gate incident from both Ms. Sandner and Lutzi. Though Modesto Flores was terminated for allegedly having some sort of altercation with Martinez, Heinz admitted that Marinez was not subject to any disciplinary action, notwithstanding the fact that Martinez had wielded a knife at employees on at least three occasions and management was aware of those incidents.

Employees Andres Pullinario testified that sometime after the above discharges Heinz held a meeting of employees. At this meeting Pullinario testified he was "nervous" about the working environment at Respondent since the termination of the three men. He asked Heinz why the men had been terminated. Heinz responded that Jose Luis Mendez "was an agitator within the company;" therefore, he was dismissed. He then went on to explain that because Cayetano Flores and Modesto Flores were related to Jose Luis Mendez, then they may all have the same ideas; therefore, he discharged these men as well.

Shortly after the discharges described above these employees contacted representatives from the Union. Jose Luis Mendez held two organizational meetings at his home at the end of January and the beginning of February. By the end of the second meeting, the Union collected the requisite amount of authorization cards and filed a petition for election with the National Labor Relations Board on February 17. Subsequently, an election for representation was conducted and the

Union was certified as the collective bargaining representative on March 30.

Analysis and Conclusion

In determining whether an employer discriminates against an employee because of his membership in or activity on behalf of a labor organization, General Counsel has the burden of proving that the employees' membership in, or activities on behalf of such labor organization was a motivating factor in the discrimination alleged. Once such factor is established, the burden then shifts to the employer to establish that such action would have taken place in the absence of the employees' membership in, or activities on behalf of such labor organization. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1982); *Wright Line, a division of Wright Line, Inc.*, 1251 NLRB 1080 (1980) enfd. 662 F2d. 899 (1st Cir.) cert. den. 455 U.S. 989 (1982).

In the instant case, it is admitted by Lutzi that the sole reason for her suspension of Mario Mandez was his speaking out at the meeting to protest Respondent's new policy of requiring the production employees to open the plant gate in the morning. The issue presented is whether such conduct constitutes protected concerted activities.

In *Whittaker Corp.*, 289 NLRB 993, the Board in reversing the Administrative Law Judge stated:

Specifically in *Meyers I*, 268 NLRB at 494, and again in *Meyers II*, 281 NLRB 882, we reaffirmed *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), and other cases holding that "the guarantees of Section 7 of the Act extend to concerted activity which in its inception

involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." Thus, the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2nd 1357, 1365 (4th Cir. 1969). Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing... group action..." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

The Board went on to state:

"Particularly in a group meeting context, a concerted objective may be inferred from the circumstances."

The evidence in this case establishes that Mario Mendez was protesting Respondent's new policy on behalf of all employees. Thus Mendez told Sandner at the meeting when Respondent's new policy was first announced "we are the workers, the employees, after you open the factory." See *Whittaker supra* at pg. 934.

Moreover, in *Avery Leasing, Inc.*, 315 NLRB 73 (1994), the Board held that "where an employee, in the presence of other employees, complains to management concerning wages, hours, or other terms and conditions of employment, such complaints constitute protected concerted activity, even though the employees purports to speak on behalf of himself.

In any event, within hours following the Mendez suspension, the employees met with Lutzi wherein Cayetano Flores then calmly stated that he definitely wanted to work, but he also wanted Mario Mendez to keep his job, and Raphael Daleano, a security guard,

reiterated to Lutzi that, traditionally, opening the gate was the responsibility of security.

Thus, I conclude Mario Mendez was engaged in protected concerted activity, and that he was admittedly suspended for such activity. It is clear that General Counsel has established its *Wright Line* burden.

Respondent simply contends that such activity was not protected, and that if it were, Respondent had no knowledge of the concerted nature of such protected activity. For the reasons discussed above, I reject Respondent's contentions and conclude that Mario Mendez was suspended in violation of Section 8 (a) (1).

In most situations, an employee who voluntarily quits cannot contend that the separation was a discriminatory discharge in violation of section 8 (a) (3). In many cases, however, the Board and the courts have deemed that employees whose terminations appeared voluntary had been "constructively discharged." In the *Crystal Princeton* case, the Board defined "constructive discharge" as follows:

There are two elements which must be proven to establish a constructive discharge. First, the burden imposed upon the employee must, cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

In the instant case all discriminatees are long time employees, and interrelated. Mario Mendez and Jose Luis Mendez are brothers. Modesto Flores and Cayetano Flores are also brothers. Additionally, the

Mendez brothers and the Flores brothers are brothers-in-law to the Mendez brothers. The four alleged discriminatees are a family unit. Indeed, the primary reason for the discharge of Jose Luis Mendez and the Flores brothers was Heinz Vieluf's belief that they might protest Mario Mendez's suspension in a manner that would affect their work.

The credible testimony of Pullinario, described below, who was still employed by Respondent at the time he testified establishes that Jose Luis Mendez, Modesto Flores and Cayetano Flores were discharged because of their close and familial relationship. n1 I conclude to require Mario Mendez to return to work after Respondent has unlawfully discharged his brother, and two brothers-in-law satisfies the requirements for a finding of a constructive discharge. Accordingly, I conclude that Mario Mendez was constructively discharged in violation of Section 8 (1) (1) of the Act.

Pullinario also testified that he was "nervous" because he did not understand why the three men were terminated. Therefore, he decided to ask Heinz Vieluf directly why the discharges occurred. Heinz responded by stating that Jose Luis Mendez "was an agitator within the company;" therefore, he must be terminated. He further stated that because Cayetano Flores is the brother-in-law of Jose Luis Mendez, then he quite possibly could have the same ideas he had to be terminated, and finally, that because Modesto Flores is the brother of Cayetano Flores, he may have the same ideas as well. It is clear that Heinz believed that a family relationship was a sufficient basis to assume they would act concertedly, and they were discharged for such reasons.

Heinz Vieluf did not deny such conversations. Moreover, in view of his contradictions and other statements discussed below, I conclude Heinz is not a credible witness and credit only his admissions against Respondent's interest. Moreover, the timing of the discharges, one day after Mario Mendez's suspension, confirm that the discharges were solely motivated by the employees familial relationship with Mario Mendez.

In *Thorogen Toll and Molding, Inc.*, 312 NLRB 628 (1993), an employee was discharged because of his wife and mother-in-law's union activity. The Board found a violation of 8 (a) (1) and (3) of the Act, because the employer associated the employee with the wife and mother-in-law and discharged the employee based on this relationship. Here, it is clear that Mr. Vieluf associated the men with one another.

It is clear that General Counsel has established it *Wright Line* burden with an exceptionally strong prima facie case.

As set forth above, each of the three alleged discriminatees was given a letter stating that they were being laid off.

Such letter was issued pursuant to the direction of Heinz Vieluf. However, during Heinz's testimony he testified that in fact the employees were discharged, rather than being laid off.

When attempting to explain why each man was given such a letter that could potentially be sent to the State of New York for unemployment benefits, he stated he was not concerned about what the letter stated, because "depending on the circumstances that arise," he had a practice of changing his mind as to why an individual is terminated.

Thus based upon the contradictions as to layoff vs. discharge and his explanation, it is clear that he is not a credible witness, and is testimony can be credited only when it is an admission against Respondent's interest.

Heinz Vieluf initially testified that he discharged Jose Luis Mendez in January, because he thought he may have improperly mixed a batch of meat in July 1999. On cross-examination, Heinz testified that he had absolutely no proof to support his suspicion. Moreover, Mendez was never disciplined in any way for this alleged mistake. He then contradicted this testimony by testifying that based on Mario Mendez's one day suspension and the relationship between the Mendez brothers, he thought Jose Luis Mendez might "do something to the product."

In view of Heinz Vieluf's contradictions concerning the reasons for discharge and his admissions that he fabricated reasons for discharge depending on the circumstances, I do not credit his testimony that Mendez was discharged because of his belief that Mendez spoiled a batch of meat in July 1999.

Additionally I find such contention incredible in view of the six month delay between the alleged meat incident and the discharge, the total absence of any reason why he would suspect Mendez of spoiling the meat, and his admission that other employees spoiled similar batches of meat they were not discharged. There I find Respondent has not met its *Wright Line* burden with respect to Jose Luis Mendez.

With respect to the discharge of Cayetano Flores, Heinz Vieluf testified that he terminated Flores because he thought Flores might do "the same thing that I was thinking Jose might do because they used to

work together." On cross-examination, Vieluf modified his original testimony as to why he discharged Cayetano Flores. He testified that he was also worried that Cayetano Flores "might react differently" because his brother, Modesto Flores, was terminated. He further testified that he was also concerned because "Mr. Jose Luis Mendez and Mr. Cayetano had a family relationship." No testimony was introduced as to why he formulated such belief. In view of my unfavorable impression of Heinz Vieluf's credibility I find his reasons for discharging Cayetano unbelievable. Accordingly, I find Respondent has not met is *Wright Line* burden.

With respect to Modesto Flores, Heinz Vieluf testified that he terminated Flores because of an incident he had with Andres Martinez, a/k/a Ramon Guayabo, an employee at Cibao. He testified that an altercation occurred in late summer or early fall 1999 when Martinez pulled a knife on Modesto Flores. Flores credibly testified that no one from management, including Heinz Vieluf, spoke to him privately about any incident involving Mr. Martinez. Flores does recall that approximately three months before the incident with Martinez, Lutzi and Sandner assembled the employees for a meeting where Martinez was discussed. Lutzi, at this meeting told the employees not to joke with Mr. Martinez because he was "slow." n2 Modesto told Lutzi that the employees did joke with Martinez occasionally, but Martinez would "come after us even when we weren't joking with him." Lutzi did not respond.

Heinz Vieluf thereafter testified contradicting his initial testimony that he discharged Modesto Flores because of an incident between Martinez and Modesto

that allegedly occurred on January 14, 2001. He testified that on the morning of January 14, before left for a business trip, he noticed a commotion in the packing area. When he investigated, he observed Mr. Martinez wielding a knife at multiple employees. He then testified that he assumed the incident involved Flores, though at the time, he had no proof substantiating this claim. He then testified that he verified his assumption, but failed to state with whom he verified his assumption, when he verified his assumption or how he verified his assumption. Further, Vieluf provided no corroborating testimony or documents to support his assertion that there was an altercation involving Martinez, and Flores.

Based upon my impressions of Heinz Vieluf's credibility, discussed above, his contradictory reasons for the discharge of Modesto Flores, his total lack of evidence to support any altercation between Martinez and Flores, I conclude Vieluf's reason's for Flores' discharge are untrue.

However, assuming the alleged incident occurred between Flores and Marinez on January 14, 2001, the discipline imposed does not comport with Respondent's normal practice. Vieluf admits to having knowledge that Martinez pulled a knife on various employees on at least three occasions, but did not reprimand him for any of these incidents. He also admits that when an incident between two employees occurs, both receive the identical reprimand or discipline. Martinez was never disciplined for such alleged incident.

Accordingly, I conclude Respondent has failed to meet its *Wright Line* burden.

The facts establish that after the discharge of Jose Luis Mendez, Modesto Flores and Cayetano Flores, Jose Luis Mendez contacted the Union. Union organization begun the last week in January. A petition for an election was filed. An election was held on March 30 which the Union won. The Union was thereafter certified to represent Respondent production and maintenance employees.

General Counsel contends Respondent's refusal to reinstate the discharged employees was a violation of Section 8 (a) (3) of the Act.

There is no evidence that Respondent took any action to discourage the employees right to organize. The discharges occurred prior to any Union activity. Since the remedy for a Section 8 (a) (1) discharge is the same effective remedy as to the employees, I reject General Counsel's contentions.

Remedy

Having found Respondent has engaged in violations of Section 8(a) (1) and (3) of the Act, I shall recommend it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent unlawfully laid off or discharged the employees whose names are set forth below, I shall recommend that the Respondent offer them immediate and full reinstatement to their former jobs or, a substantially equivalent position without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth*

Co., 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Mario Mendez	Cayetano Flores
Jose Luis Mendez	Modesto Flores

Based on the above findings of fact and conclusion of law, and the entire record, I issue the following recommended;

Order n3

Respondent, Cibao Meat Products, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging suspending, or laying off its employees because of their protested concerted activities.

2. Take the following affirmative action necessary to effectuate the polices of the Act.

(a) Within 14 days of this Order, offer to Mario Mendez, Jose Luis Mendez, Cayetano Flores, and Modesto Flores, full reinstatement to their former jobs, or if such job no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole the above named employees as set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, social security payment

records, timecards, personnel records and reports, and all other necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days from the date of this Order, remove from its files any reference to the above discriminatory suspension and discharges of the above named employees and notify them in writing that this has been done and that evidence of this discriminatory action will not be used as a basis for future personnel action against him.

(e) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix" n4 Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 17, 2001

HOWARD EDELMAN, Administrative Law Judge

Footnotes

n1 In determining the credibility of a witness, the Board considers the fact that testifying may pose a risk to the witness. In *Shop-Rite Supermarket, Inc.*, 231 NLRB 72 (1977), the Board noted that if testimony is given at considerable risk of economic reprisal, including loss of employment, then the testimony is not likely to be false.

n2 Four witnesses, including Mr. Vieluf and Ms. Vieluf-Isidor, testified that Mr. Martinez is a mentally slow, problematic individual, who "retaliates" by wielding a knife if he perceives harassment from other employees.

n3 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

n4 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or suspend you because of your protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jose Luis Mendez, Cayetano Flores, and Modesto Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mario Mendez, Jose Luis Mendez, Cayetano Flores, and Modesto Flores whole for any

loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the suspension and discharges will not be used against them in any way.

CIBAO MEAT PRODUCTS

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, suspend, lay off our employees because of their protected concerted activities.

WE WILL within 14 days of this order offer Mario Mendez, Jose Luis Mendez, Cayetano Flores and Modesto Flores full reinstatement to their former jobs or, if such jobs no longer exists, to a substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole the above named employees for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL within 14 days of this Order make available to the Board or its agents for examination and copying,

all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

WE WILL within 14 days of this Order remove from their files any reference to the above discriminatory suspension and discharges of the above named employees, and notify them in writing that his has been done and that evidence of this discriminatory action will not be used as a basis for future personnel action against them.

WE WILL within 14 days after service by the Region, post at our facility copies of the attached notice marked "Appendix". Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2000.

WE WILL within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

attesting to the steps that the Respondent has taken to comply.

CIBAO MEAT PRODUCTS
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 26 Federal Plaza, Room 3614, New York, New York 10278-0104, Telephone 212-264-0346.

03-4997, 03-40023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Cross-Respondent,

-v.-

CIBAO MEAT PRODUCTS,
Respondent-Cross-Petitioner.

April 22, 2004, Filed

Present: Hon. Dennis Jacobs, Hon. Chester J. Straub, Circuit Judges, Hon. Gregory W. Carman, District Judge,*

A petition for panel rehearing having been filed herein by Respondent-Cross-Petitioner Cibao Meat Products, Inc.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By:
Arthur M. Heller,
Motions Staff Attorney

Footnotes

* The Honorable Gregory W. Carman of the United States Court of International Trade, sitting by designation.

Supreme Court, U.S.
FILED
OCT 1 3 2004
OFFICE OF THE CLERK

(2)

No. 04-107

In the Supreme Court of the United States

CIBAO MEAT PRODUCTS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (the Board) reasonably concluded that petitioner unlawfully discharged employees based on a belief that those employees would engage in concerted activity protesting the suspension of another employee.

2. Whether the Board reasonably concluded that an employee was engaged in concerted activity when he protested a change in an employment term during a meeting at which the change was announced to all employees.

3. Whether substantial evidence supported the Board's determination that petitioner engaged in unfair labor practices.

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In the Supreme Court of the United States

No. 04-107

CIBAO MEAT PRODUCTS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is *reprinted in* 84 Fed. Appx. 155. The decision and order of the National Labor Relations Board (Pet. App. 4a-13a) and the decision of the administrative law judge (Pet. App. 13a-35a) are reported at 338 N.L.R.B. No. 134.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2004. A petition for rehearing was denied on April 22, 2004 (Pet. App. 36a-37a). The petition for a

writ of certiorari was filed on July 21, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner processes and sells meat products. Pet. App. 14a. Approximately 30 production employees work at its facility in Bronx, New York. *Id.* at 15a. Petitioner also employs several security employees, who usually assist a member of management in unlocking the facility's gated entrance each morning. *Ibid.*

On the morning of January 17, 2000, long-time production employees Mario Mendez, Jose Luis Mendez, Modesto Flores and Cayetano Flores arrived together to work at petitioner's Bronx facility. Pet. App. 15a, 18a, 22a-23a. Mario Mendez and Jose Luis Mendez are brothers, Modesto Flores and Cayetano Flores also are brothers, and the two pairs of brothers are related to one another by marriage. *Id.* at 22a-23a. When the four of them arrived to work, the entrance gate was locked. *Id.* at 15a. Consistent with the usual practice, they remained in their car and waited for a manager or a security employee to open the entrance gate. *Ibid.* In a short time, petitioner's vice president, Lutzi Vieluf-Isidor arrived and unlocked the gate. *Ibid.* Vieluf-Isidor briefly waited for someone to assist her in lifting the gate. When no security guard came to assist her, another employee volunteered to lift the gate. *Ibid.*

Vice President Vieluf-Isidor then directed petitioner's quality control manager, Elisabeth Sandner, to summon all employees to a meeting. Pet. 3; Pet. App. 15a. At the meeting, Sandner stated that the vice president was very upset because no production employee had immediately assisted her with opening the gate that morning. *Id.* at 15a. Sandner further stated

that petitioner would immediately be implementing a new policy under which all employees would be responsible for opening the gate. *Ibid.* Sandner added that petitioner would issue a one-day suspension to any employee who did not voluntarily comply with the policy. *Id.* at 15a-16a. Mario Mendez spoke up in response to the new policy, stating that it was not his job, but was the job of the security guards, to open the gate. *Id.* at 16a. He added, "we are the workers, the employees, after you open the factory." *Ibid.*

After the meeting, Sandner reported to Vice President Vieluf-Isidor that Mario Mendez did not want to open the gate or abide by the new policy. Pet. App. 16a. The vice president immediately announced over petitioner's intercom system that Mario Mendez was suspended for one day. *Ibid.* Mendez returned to the locker room to change into his street clothes. *Ibid.* While Mendez was changing his clothes, other employees, including Jose Luis Mendez, Cayetano Flores, and Modesto Flores, decided to speak to the vice president on Mario Mendez's behalf. *Ibid.* When the group of about 30 employees approached the vice president, she grew upset and stated that if the employees did not want to work she would close the factory. *Ibid.* Cayetano Flores explained that he wanted to work but that he also wanted Mario Mendez to keep his job. *Ibid.* A security guard added that the job of opening the gate was traditionally security's responsibility. *Ibid.* The vice president told the workers that Mario Mendez could return to work the next day but that he was still suspended because she wanted her word to count for something. *Id.* at 16a-17a.

After meeting with the employees, the vice president met privately with Mario Mendez. She explained that she had suspended him because he protested the new

policy in front of other employees. Pet. App. 17a. She later admitted that she would not have suspended Mendez if he had spoken with her privately about his concerns with the new policy. *Ibid.* Later that afternoon, Jose Luis Mendez, Cayetano Flores, and Modesto Flores initiated a second meeting with the other employees to discuss Mendez's suspension and how the employees could more effectively represent themselves before management. *Ibid.*

That evening, Vice President Vieluf-Isidor spoke by telephone to her brother, petitioner's president, Heinz Vieluf, about the gate incident and Mendez's suspension. Pet. App. 17a. Vieluf had already discussed the incident with Sandner. *Ibid.* Vieluf, without explanation, told his sister to fire Cayetano Flores, Modesto Flores, and Jose Luis Mendez. *Ibid.* The following day, Vice President Vieluf-Isidor discharged those employees. *Ibid.* When asked to give the reason for their termination, the vice president said that she did not know. *Ibid.* Cayetano Flores asked for a dismissal letter, which the vice president agreed to provide. *Id.* at 17a-18a. Later that day, the employees picked up their dismissal letters, as well as a letter of suspension addressed to Mario Mendez. *Ibid.* The dismissal letters to Jose Luis Mendez, Modesto Flores, and Cayetano Flores stated that they were being temporarily laid off because of lack of work. *Ibid.* Mario Mendez's suspension letter stated that he was suspended for one day. *Ibid.*

Sometime after the discharges, President Vieluf held a meeting of employees. Pet. App. 19a. When asked why the three men had been terminated, Vieluf explained that Jose Luis Mendez was dismissed because he "was an agitator within the company," and that Cayetano and Modesto Flores were dismissed because

they were related to Mendez and "they may all have the same ideas." *Ibid.*

2. Acting in response to charges filed by the Union representing petitioner's employees,[1] the Board's General Counsel issued a complaint alleging, *inter alia*, that petitioner violated Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1), by suspending Mario Mendez and by discharging Cayetano Flores, Modesto Flores, and Jose Luis Mendez. Pet. App. 14a. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA, 29 U.S.C. 157. Those protected rights include "the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157.

a. After a hearing, an administrative law judge (ALJ) ruled that petitioner had violated Section 8(a)(1) of the NLRA. Pet. App. 13a-31a. The ALJ first concluded that petitioner violated Section 8(a)(1) by suspending Mario Mendez for "speaking out at the meeting to protest [petitioner's] new policy of requiring the production employees to open the plant gate in the morning." *Id.* at 20a. The ALJ explained that "individual action is concerted as long as it is 'engaged in with the object of initiating or inducing . . . group action.'" *Id.* at 21a (quoting *Mushroom Transp. Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). The ALJ further explained that, "[p]articularly in a group-meeting context, a concerted objective may be inferred from the

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[1] Shortly after the events in this case took place, Local 169, Union of Needletrades, Industrial and Textile Employees, AFL-CIO, became the certified collective-bargaining representative of petitioner's employees. Pet. App. 19a-20a.

circumstances." *Ibid.* (quoting *Whittaker Corp.*, 289 N.L.R.B. 933, 934 (1988)). The ALJ found that the evidence established that "Mario Mendez was protesting [petitioner's] new policy on behalf of all employees," noting that Mendez had stated that "we are the workers, the employees, after you open the factory." *Ibid.* The ALJ also rejected petitioner's contention that it had no knowledge that Mendez was engaged in protected activity. *Id.* at 22a.

The ALJ next concluded that petitioner violated Section 8(a)(1) by discharging Cayetano Flores, Modesto Flores, and Jose Luis Mendez because of concerns that they might protest the discharge of Mario Mendez. Pet. App. 22a-27a. The ALJ relied on the statements of petitioner's president at an employee meeting to the effect that Jose Luis Mendez was discharged because he "was an agitator within the company," and that Cayetano Flores and Modesto Flores were discharged because, as Jose Luis Mendez's brothers-in-law, they might be in agreement with Jose Luis Mendez. *Id.* at 23a. The ALJ also found that the "timing of the discharges, one day after Mario Mendez's suspension, confirm[s] that the discharges were solely motivated by the employees[']familial relationship with Mario Mendez." *Id.* at 24a.

The ALJ rejected petitioner's unsupported claim that President Vieluf discharged Jose Luis Mendez because he suspected that Mendez may have been responsible for improperly mixing a batch of meat in July 1999—six months before the Mendez incident. Pet. App. 18a, 25a. The ALJ also rejected petitioner's uncorroborated contention that President Vieluf discharged Modesto Flores because he believed that Modesto had been involved in an altercation with one of petitioner's employees. *Id.* at 17a-19a, 26a-27a, 31a n.2.

b. The Board affirmed the ALJ's findings and conclusions in pertinent part. Pet. App. 4a-13a. The Board rejected petitioner's argument that Mario Mendez engaged in unprotected insubordination by protesting a management decision. Recognizing that "an employee's right to engage in concerted activity must be balanced against the employer's right to maintain order and respect," the Board explained that some concerted activity may, if sufficiently egregious or offensive, lose the protection of the Act. *Id.* at 6a-7a. The Board found no evidence in this case, however, that "Mendez' statement was an intemperate outburst in response to [petitioner's] directive, that it was disruptive or that it was otherwise so egregious or offensive as to forfeit the protections of the Act." *Id.* at 7a.

The Board ordered petitioner to cease and desist from discharging, suspending, or laying off its employees because of their protected activity; to make the employees whole for any lost earnings and benefits suffered as a result of petitioner's discriminatory conduct; and to post an appropriate remedial notice at petitioner's Bronx facility. Pet. App. 8a-9a.

3. The Board filed an application in the court of appeals for enforcement of its order, and petitioner filed a cross-petition for review. Pet. App. 1a-2a. In an unpublished summary order, the court enforced the Board's order and denied petitioner's cross-petition for review. *Ibid.* The court stated that petitioner argued for "alternative findings and inferences that were available and permissible," but that "the Board's legal conclusions are reasonably based, and substantial evidence supports its factual findings." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore unwarranted.

1. Petitioner challenges (Pet. 10-16) the court of appeals' affirmance of the Board's conclusion that petitioner violated Section 8(a)(1) of the NLRA by discharging employees Jose Luis Mendez, Modesto Flores, and Cayetano Flores based on concerns that those employees would engage in concerted action protesting the suspension of Mario Mendez. According to petitioner (Pet. 8), the Board expanded the meaning and the scope of Section 7 of the NLRA by "requir[ing] an 8(a)(1) violation in all situations where employers fear that employees intended to engage in concerted activity —irrespective of whether the feared employee conduct is protected or unprotected by the Act." Petitioner's argument mischaracterizes the Board's findings and presents no issue warranting review by this Court.

a. As petitioner acknowledges (Pet. 12), an employer acts unlawfully by taking action against employees based on a belief that the employees engaged (or intended to engage) in protected concerted activity, regardless of whether the employees in fact engaged in or intended to engage in such activity. See *JCR Hotel, Inc.* v. *NLRB*, 342 F.3d 837, 840 (8th Cir. 2003); see also *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 589-90 (1941) (violation of NLRA to discharge employee for apparent mistaken belief that he was member of, and solicited for, union). The court of appeals correctly upheld the Board's application of that principle here, holding that the Board reasonably found that petitioner believed that the employees would engage in concerted activity

protesting Mario Mendez's unlawful suspension. As soon as petitioner's president learned about the gate incident and the suspension of Mario Mendez, the president singled out Mendez's relatives and, without giving a reason, ordered their discharge. As the Board explained (Pet. App. 23a), petitioner "believed that a family relationship was a sufficient basis to assume that [the three employees] would act concertedly" to protest the unlawful suspension of Mario Mendez.[2]

b. Contrary to petitioner's contention (Pet. 14-15), the Board's decision does not depart from the settled principle that an employer must have knowledge of the concerted nature of activity. As the Board found, petitioner clearly believed that the employees would take action in support of Mario Mendez, which in itself indicates suspected concerted activity. Pet. App. 19a, 23a-24a. Moreover, petitioner's admission that it discharged Jose Luis Mendez because he was an "agitator," and its admitted assumption that the three discharged employees held shared ideas by virtue of their familial relationship, support an inference that

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[2] In so finding, the Board drew on precedent that employers violate the NLRA by discharging employees because of their family relationship to other employees who have engaged in protected activities. Pet. App. 24a (citing *Thorgren Tool & Molding, Inc.*, 312 N.L.R.B. 628, 630-631 (1993) (holding that employer violated Section 8(a)(3) and (1) of the NLRA by discharging employee because of union activity of employee's wife and mother-in-law)); see *Kenrich Petrochems., Inc.* v. *NLRB*, 907 F.2d 400, 402-404, 406 (3d Cir.) (en banc) (Board properly ordered reinstatement of supervisor who was unlawfully discharged because of union activities of her family members), cert. denied, 498 U.S. 981 (1990); *NLRB* v. *Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-1089 (7th Cir. 1987) (employer violated Section 8(a)(1) of the NLRA by discharging supervisor because of her son's union activity).

petitioner believed they would act in concert. *Id.* at 19a.[3]

There also is no merit to petitioner's related suggestion (Pet. 10) that the Board's decision subjects employers to unfair labor practice findings "irrespective of whether the * * * concerted activity is protected or unprotected by the Act." The Board found that petitioner discharged the three employees based on a belief that "they would act concertedly in the protected endeavor of protesting Mario Mendez' unlawful suspension." Pet. App. 13a. The three employees, along with virtually all of their co-workers, had already met with petitioner's vice president to express their opposition to Mario Mendez' suspension. In those circum-

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[3] The cases relied on by petitioner (Pet. 14-15) are inapposite, because there was no factual basis in those cases to support any inference of employer knowledge that a discharged employee had acted (or would act) in concert with other employees. In *Air Surrey Corp.* v. *NLRB*, 601 F.2d 256, 257 (6th Cir. 1979), the court held that there was no employer knowledge of concerted activity where the employer knew only that one employee had gone to the employer's bank to inquire whether sufficient funds existed to cover the payroll, and other employees, who had intended to go along, told the employer that they were not involved. *NLRB* v. *Office Towel Supply Co.*, 201 F.2d 838, 840 (2d Cir. 1953), held that an employer that discharged an employee for complaining about workload was unaware that the employee had engaged in concerted activity, because the employer knew only that the employee had made the statement but had no knowledge that the statement was made during a discussion with other employees about the need for a union. *NLRB* v. *Westinghouse Elec. Corp.*, 179 F.2d 507, 509 (6th Cir. 1949) (per curiam), held that an employer lawfully discharged an employee for disturbing other workers and destroying morale by telling employees, incorrectly, that they were making less money than employees at another plant; the employer did not know that the employee was working in concert with other employees.

stances, the Board is entitled to conclude that, by discharging the employees, petitioner intended to prevent them from engaging in additional statutorily protected forms of protest.

Petitioner misconstrues the Board's decision in arguing (Pet. 8, 10-11) that the decision subjects employers to unfair labor practice findings even if they act based on a belief that employees will engage in unprotected activity. In fact, the Board found (Pet. App. 24a-27a) that petitioner failed to meet its burden under *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983), to establish that it would have discharged the three employees based on a good faith belief that they would engage in unprotected activity. The Board, as petitioner acknowledges (Pet. 13-14), rejected, as not credible, petitioner's claim that it discharged two of the employees based on a belief that the employees might have sabotaged petitioner's product to retaliate for Mario Mendez's suspension. See Pet. App. 24a-27a. Petitioner's fact-bound disagreement with the Board's rejection of that asserted basis for the discharges warrants no further review.

2. Petitioner argues (Pet. 16-21) that the Board erred in finding that petitioner violated Section 8(a)(1) of the NLRA by suspending Mario Mendez for engaging in concerted activity. That fact-bound contention lacks merit and does not warrant review.

a. Petitioner asserts (Pet. 17) that, in finding its suspension of Mario Mendez unlawful, the Board impermissibly held "that an employee who speaks out at an employee group meeting is *per se* engaging in concerted activity." Because petitioner failed to raise that argument before the Board (or in a motion for reconsideration with the Board), the NLRA prevents the Court from considering it in the first instance. See

29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982) (bar against judicial review under 29 U.S.C. 160(e) applies where party fails to preserve objection to Board's decision by filing petition for reconsideration with Board); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same). Petitioner also failed to raise its "*per se*" argument in the court of appeals. This Court typically does not consider claims that were neither raised nor decided below, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), and there is no reason for departing from that customary practice here.

In any event, petitioner's characterization of the Board's decision is incorrect. The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986), enforced, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988); see *Mushroom Transp. Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or * * * it had some relation to group action in the interest of the employees"). See also *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing

as an example "the lone employee" who "intends to induce group activity").

In deciding "when the act of a single employee is or is not 'concerted,'" the Board has held that the "object of inducing group action need not be express," but "may be inferred from the circumstances." *Whittaker Corp.*, 289 N.L.R.B. 933, 933-934 (1988); accord *NLRB* v. *Caval Tool Div.*, 272 F.3d 184, 190 (2d Cir. 2001); see *El Gran Combo* v. *NLRB*, 853 F.2d 996, 1005 (1st Cir. 1988) ("There is little doubt" that employee's objection at meeting "was meant to light a fire under" co-workers.); *Ajax Paving Indus., Inc.* v. *NLRB*, 713 F.2d 1214, 1218 (6th Cir. 1983) (per curiam) (Board reasonably inferred that employee's conduct "reflected commonality of purpose"); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 412*, 328 N.L.R.B. 1079, 1081 (1999) (object of inducing group action need not be express).

Contrary to petitioner's claim (Pet. 17), the Board did not hold "as a matter of law" that an employee who speaks out during an employee group meeting "has done so with the object of initiating" group action. Instead, the Board based its finding of concerted activity on "reasonable inferences raised by the totality of the circumstances surrounding [the employees'] conduct." *Ajax Paving Indus., Inc.* v. *NLRB*, 713 F.2d 1214, 1218 (6th Cir. 1983) (per curiam). In particular, the Board's determination was based on considerations that have been identified as relevant in the context of an employee meeting, including whether the employee protests a management action that affects a large number of employees.[4] Petitioner called an all-employee

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[4] See *NLRB* v. *Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998) (employee questioned employer safety measures that affected the

meeting to announce a new work rule requiring all production employees to assist management in opening the gated front entrance, and Mendez protested the new rule at the meeting in the presence of the other employees, using the collective form—"*we* are the workers, the employees, after you open the gate." Pet. App. 16a (emphasis added); see *NLRB* v. *Caval Tool Div.*, 272 F.3d at 189-190 (employee's comments concerted not merely because they were made at an employee meeting called by employer, but because they were directed at an announced change in the terms and conditions of employment); *Rockwell Int'l Corp.* v. *NLRB*, 814 F.2d 1530, 1535 (11th Cir. 1987) (employee voiced concern common to the employees in the group meeting; the group was aware of the actions, since they were present at the meeting).

b. Petitioner contends (Pet. 18-21) that, even if Mario Mendez engaged in protected, concerted activity, petitioner lacked knowledge that Mendez was engaged in such activity when it disciplined him. Petitioner's disagreement with the Board's factual finding regarding petitioner's knowledge does not warrant this Court's review. In any event, the Board reasonably found that petitioner knew about Mendez's protected concerted activity when it suspended him. Petitioner's vice president admitted that she suspended Mendez

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entire plant); *Rockwell Int'l Corp.* v. *NLRB*, 814 F.2d 1530, 1535 (11th Cir. 1987) (employee objected to employer's lecturing employees about volume of radio headsets worn by employees and also commented on noise in the workplace). Because the Board considers whether the subject of the employee's protest affects the other employees present at the meeting, petitioner errs in asserting (Pet. 17) that the Board will find a concerted objective "even in the absence of evidence that the issue was important to anyone other than the speaker."

because he spoke up at the meeting, and that she would not have suspended him if he had come to her privately with his concerns rather than raising them at the group meeting. Pet. App. 17a. Here, as in *NLRB* v. *Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998), the context of the group meeting made the employer "very aware" that the complaining employee's conduct "might induce [other] employees to act."

c. Petitioner errs in suggesting (Pet. 9, 17) that the Board's interpretation of Section 7 renders employers powerless to control employee conduct during group meetings or to discipline employees who challenge authority. The Board specifically observed that "an employee who is engaged in concerted activity may, by conduct that is sufficiently egregious or offensive, lose the protection of the Act." Pet. App. 6a-7a; see *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984) ("An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7."). The Board reasonably applied that rule here in finding that "[t]here is no indication in the record * * * that Mendez' statement was an intemperate outburst in response to [petitioner's] directive, that it was disruptive or that it was otherwise so egregious or offensive as to forfeit the protections of the Act." Pet. App. 7a.

3. Finally, petitioner contends (Pet. 21-25) that the court of appeals erred in concluding that substantial evidence supports the Board's factual findings. As this Court has explained: "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misappre-

hended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). The court of appeals did not "misapprehend" the substantial evidence standard, and there is no warrant for reviewing the court's fact-bound application of that standard in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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